Supreme Court, U.S.
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No.____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

* * * * *

DENNIS EDWARD DREW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

* * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* * * * *

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QUESTION PRESENTED

I. WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT THE EXTENT OF THE TRIAL COURT'S DEPARTURE ABOVE THE FEDERAL SENTENCING GUIDELINES SENTENCING RANGE WAS REASONABLE.

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DENNIS EDWARD DREW,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Dennis Edward Drew, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit[1] rendered in these proceedings on February 1, 1995.

[1]The parties to the proceeding in the Court of Appeals were Dennis Edward Drew and the United States of America

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in this cause, docketed in that court as Cause no. 94-2348, was published as *United States v. Drew*, 46 F.3d 823 (8th Cir. 1995). It is reprinted in the appendix to this petition beginning at page 1a, *infra*.

JURISDICTION

The original opinion of the United States Court of Appeals for the Eighth Circuit was entered February 1, 1995. A timely motion for rehearing was overruled on March 6, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory, constitutional, and Sentencing Guidelines provisions involved in this case are set out in full in the Appendix.

18 U.S.C. §3742(f)(2)

18 U.S.C. §3553(a)(6)

28 U.S.C. §991(b)

28 U.S.C. §994(f)

28 U.S.C. §1254(1)

28 U.S.C. §2241

28 U.S.C. §2255

Sentencing Guidelines §2A2.1 (1987)

Sentencing Guidelines §2J1.2 (1987)

Sentencing Guidelines §3D1.2 (1987)

Sentencing Guidelines §3D1.4 (1987)

STATEMENT OF THE CASE

Jurisdiction in this federal habeas corpus case was founded upon 28 U.S.C. §2241 and §2255.

Petitioner was convicted of conspiracy to distribute cocaine and cocaine base, distribution of cocaine, and obstruction of justice. He was sentenced, on October 26, 1988, to a term of 180 months imprisonment, a fine of $20,000, and a special assessment of $250.00. The sentence imposed was an upward departure from the Sentencing Guidelines range which, as determined by the court and the Presentence Investigation Report was 87-108 months.

The calculation leading to this range was a base offense level of 22, based on the drug quantity, to which were added three two level adjustments for the presence of a weapon in the drug house, the petitioner's leadership role, and for obstruction of justice. The obstruction of justice adjustment was made as a result of petitioner's conviction of the offense of obstruction of justice. Pursuant to Sentencing Guidelines §3D1.2(c) (1987), this conviction was grouped with the conviction for the substantive offense, and the resulting offense level was adjusted. Thus, the total offense level was 28.[2]

The conduct underlying the obstruction conviction was the attempt by petitioner to hire another person to kill a government witness. The trial court found that the two level adjustment provided in the Guidelines was insufficient given the seriousness of this conduct, and departed upward.

At the sentencing hearing, trial counsel objected to the fact that the trial judge proposed to depart from the guideline range. However, once sentence was announced, she made

[2]Petitioner's criminal history category of II was not in dispute.

no trial objection that the extent of the departure was unreasonable and no request that the trial court articulate reasons for the sentence as required by the Sentencing Reform Act.

The same counsel represented petitioner on direct appeal from his conviction. Among the issues raised was the propriety of departure above the guideline range. However, as at trial, counsel made no contention on appeal that the departure was unreasonable in extent. The Court of Appeals upheld the trial court's right to depart under these circumstances but did not address the extent of the departure.

Petitioner then instituted this action for habeas corpus relief under 28 U.S.C. §2255, alleging *inter alia* that he was denied effective assistance of counsel at sentencing and on appeal because of trial counsel's failure to raise the issue of the reasonableness of the extent of the departure.

The trial court denied relief, and petitioner appealed to the Court of Appeals for the Eighth Circuit.

In its opinion, the court of appeals correctly ruled that it had not considered the issue of the reasonableness of the extent of the departure on direct appeal because the issue had not been raised at trial or on appeal. To determine whether trial counsel's failure to raise the issue had prejudiced petitioner, the court then undertook a review of the extent of the upward departure imposed in this case, and concluded that the departure was not unreasonable.

In reviewing the extent of the departure, the court of appeals stated, "We note that Drew's resulting sentence of 180 months for the combined drug offenses and the attempt to kill a witness is still five years less than the statutory maximum sentence of twenty years for the attempted murder conviction alone." *United States v. Drew*, 46 F. 3d 823, 826-827 (8th Cir. 1995).

Therefore, the court overruled petitioner's contentions: 1) that his trial counsel was ineffective for failing to object to the extent of the departure at trial); and 2) that his appellate counsel (the same counsel who represented him at trial) was ineffective for failing to challenge the extent of the departure on appeal.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONCERNING THE EXTENT OF THE DEPARTURE FROM THE SENTENCING GUIDELINE RANGE IS IN CONFLICT WITH THIS COURT'S DECISION IN *WILLIAMS V. UNITED STATES.*

In *Williams v. United States*, 503 U.S. 193, 203-204 (1992), this court held:

> In assessing reasonableness [of the extent of departures] under [18 U.S.C.] §3742 (f) (2), the [Sentencing Reform] Act directs a court of appeals to examine the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence.

By contrast, the court of appeals here failed to consider either the Guideline factors or the court's reasons in determining the reasonableness of the departure. The failure to assess the trial court's reasons is understandable; as a basis for the departure the trial court said only: "I'm going to find there's sufficient aggravating circumstances... [concerning the attempted] killing of the witness to sentence outside the guidelines..." (Sent. Tr. p. 21) and "Well, if I've ever seen the case that I ought to go above the guidelines this has got to be it." (Sent. Tr. p. 27).

However, the court of appeals also failed to consider any Guideline factors. Instead, the court noted only that the total sentence was less than the statutory maximum for the offense of attempted murder. *United States v. Drew*, 46 F.3d 823, 826-827 (8th Cir. 1995). Of course, petitioner was not convicted of attempted murder. Had he been so convicted, the relevant guideline analysis would have focussed not on the maximum statutory sentence for that offense, but on the sentencing range provided by the sentencing guidelines. At the time of the offense, the Sentencing Guidelines offense level for solicitation of murder for hire was 24: the base offense level was 20, and a total of four levels would have been added here for more than minimal planning and the fact of payment. Sentencing Guidelines §2A2.1 (1987). This offense level was less than that for the drug offenses of which petitioner was convicted.

The court of appeals thus failed to consider the factors to be considered in imposing a sentence under the Sentencing Guidelines in analyzing the reasonableness of the extent of the departure in this case. Because this procedure does not comport with the requirements of *Williams v. United States*, 503 U.S. 193, 203-204 (1992), this court should review the decision of the Eighth Circuit and make clear the process for determining the reasonableness of the extent of departures from the Sentencing Guidelines range.

II. THE COURT OF APPEALS' DECISION CONCERNING THE EXTENT OF THE DEPARTURE IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Most of the circuits, including the Eighth Circuit, have adopted an analogy approach to reviewing departures from the Sentencing Guidelines range. Examples include: *United States v. Streit*, 962 F.2d 894, 902 (9th Cir. 1992): "The purpose of our requirement that sentencing departures be guided by analogy to other guideline provisions is to ensure that the congressional objectives of uniformity and proportionality in sentencing are not defeated by unguided departures." *United States v. Tropiano*, 50 F.3d 157 (2nd Cir. 1995); *United States v. Kim*, 896 F.2d 678, 684-85 (2nd Cir. 1990); *United States v. Kikumura*, 918 F.2d 1084, 1110-1111 (3rd Cir. 1990) ("[A]nalogy to the guidelines is ... a useful and appropriate tool for determining what offense level a defendant's conduct most closely approximates."); *United States v. Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990), *cert. denied* 112 S.Ct. 1939 (1991); *United States v. Cammisano*, 917 F.2d 1057, 1064, n.5 (8th Cir. 1990) ("Several courts of appeals have held that under 5K departures, the sentencing court should link the aggravating circumstance to the structure of the guidelines. [Citations omitted] To the extent possible, we also believe district courts should attempt to do so."); *United States v. Rodriguez-Martinez*, 25 F.3d 797 (9th Cir. 1994); *United States v. Pearson*, 911 F.2d 186, (9th Cir. 1990); *United States v. Okane*, 1995 WL 145017, ___ F.3d ___ (10th Cir. 1995) (Containing an unusually careful examination of the analogies used in departing); *United States v. Jackson*, 921 F.2d 985, 990-91 (10th Cir. 1990) (Principles governing departure "In many instances... will consist of an extension of or extrapolation from other guideline levels or principles, or use of an analogy to other closely related conduct or circumstances that are addressed by the guidelines... A sentencing court

should be able to find some treatment of most offense characteristics in the Guidelines."); *United States v. Gardner*, 905 F.2d 1432, 1438 (10th Cir.), *cert. denied* 111 S.Ct. 202 (1990); *United States v. Schuman*, 902 F.2d 873 (11th Cir. 1990).

By contrast, the court of appeals here did not even pay lip service to the analogy principle, but adverted only to a consideration not anywhere articulated, either in the statute or in the case law, as justifying departure: The statutory maximum penalty. Because of the statutory policy to promote uniformity in sentencing, discussed more thoroughly in III below, it is particularly appropriate that this court review this case and clarify the standard for all of the courts of appeals. In that way, a defendant sentenced in Missouri will be assured that his sentence will be reviewed on the same basis as a defendant sentenced in Florida or California.

III. THE CONGRESSIONAL PRINCIPLE OF UNIFORM SENTENCING WILL BE FURTHERED BY REVIEW OF THIS CASE.

As this court recognized in *Mistretta v. United States*, 488 U.S. 361 (1989), a primary concern of Congress in creating the Sentencing Commission and Sentencing Guidelines was to end unwarranted sentencing disparity between similarly situated defendants convicted of similar offenses. To begin with, 18 U.S.C. §3553(a)(6) requires the court, in imposing a sentence, to consider: "The need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct..."

Creating the Sentencing Commission, Congress provided in 28 U.S.C. §991(b):

> The purposes of the United States Sentencing Commission are to-- ... provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct...

Similarly, 28 U.S.C. §994(f) provides: "The Commission, in promulgating guidelines... shall promote the purposes set forth in subsection 991(b)(1) with particular attention to... providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities." The Commission recognized this requirement in Sentencing Guidelines Chapter I, Part A., p. 2.

Within the Guideline framework, departures are the chief enemy of uniformity. For that reason, they are to be used rarely and cautiously. However, the lack of uniformity inherent in the departure decision can be limited if the trial court is required to use Guideline concept analogies in determining the extent of the departure. This is particularly true in this case.

The Sentencing Guidelines offense level here was 28, including a two level upward adjustment for obstruction of justice. The trial court seemed troubled by the fact that the obstruction of justice adjustment provided by the Guidelines was only two offense levels when the petitioner had been convicted of attempting to have a witness murdered. Since the guideline for the substantive offense of obstruction of justice (Sentencing Guidelines §2J1.2(b)(1) (1987)) did contain an adjustment if the conduct involved threats of bodily harm, the trial court's concern came close to a disagreement with the Commission's resolution of the issue, rather than a finding that the Commission had not considered it. Under these circumstances, it was particularly appropriate for the trial court

to consider how the Sentencing Commission had dealt with the conduct at issue in other contexts.

To do so, the court could have considered the guideline range for the substantive offense of obstruction of justice, Sentencing Guidelines §2J1.2 (1987). That would have resulted in an offense level of 20. Alternatively, it could have considered the offense level for attempted murder or solicitation of murder. Sentencing Guidelines §2A1.2 (1987). That would have yielded an offense level of 24. Since these analogies reveal that the Sentencing Commission clearly considered the petitioner's drug offense conduct more severe that his attempt to have the witness killed, they do not support the trial court's action in increasing petitioner's sentence by 67%, or six years, over the guideline range maximum of nine years. This is particularly true in light of the Commission's explicit decision not to simply stack sentences for multiple counts: "[W]hen a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment." Sentencing Guidelines Ch. 1, Pt. A, p. 8.

The Sentencing Guidelines specifically provide in this case that the offense of obstruction of justice, of which the petitioner was convicted, should be grouped for sentencing with the substantive offense. Sentencing Guidelines §3D1.2 (1987), Application Note 5. However, if the trial court had wanted to add an incremental punishment, another appropriate analogy would have been to the situation in which offenses are not grouped. Under Sentencing Guidelines §3D1.4 (1987), if the obstruction offense were considered as an ungrouped solicitation of murder conviction with an offense level of 24, then two levels would be added to petitioner's offense level for a sentencing range of 108-135 months. This

is still far less than the 180-month sentence ultimately imposed, and this result is arrived at only by double counting the obstruction offense both as an adjustment to the drug offense level and as a separate offense.

Petitioner has made the analysis above not to suggest that any particular analogy was required in this case, but to demonstrate that the sentence here represents a clear case of departure powers run amok. As was said in *United States v. Ferra*, 900 F.2d 1057, 1061-1062 (7th Cir.1990),

> A judge may not say: "I have decided to depart, so I now throw away the guidelines." The guidelines are designed to bring openness and consistency to sentencing, to even out the effects of different judges' perspectives on desert and deterrence.... Unless there is discipline in determining the amount of departure, however, sentencing disparity will reappear...

In this case, the possibility suggested in *Ferra* has come to pass. This court needs to review this decision and make clear to the sentencing courts throughout the nation that unguided, arbitrary departures violate the letter and spirit of the Sentencing Guidelines and the Sentencing Reform Act.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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OPINION BELOW

Dennis Edward DREW, Appellant,

v.

UNITED STATES of America, Appellee.

No. 94-2348.

United States Court of Appeals,
Eighth Circuit.
Submitted Dec. 16, 1994.
Decided Feb. 1, 1995.

Elizabeth U. Carlyle, Lee's Summit, MO, argued, for appellant.

E. Eugene Harrison, Kansas City, MO, argued, for appellee.

Before BOWMAN and LOKEN, Circuit Judges, and BOGUE[1], Senior District Judge.

BOWMAN, Circuit Judge.

Dennis Edward Drew appeals the final judgment entered in the District Court[2] denying his 28 U.S.C. s 2255 (1988) motion for relief from his sentence. For the reasons set forth below, we affirm.

[1]The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

[2]The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri.

Drew was convicted of conspiring to distribute cocaine and cocaine base in violation of 21 U.S.C. s 846 (1988); distributing cocaine in violation of 21 U.S.C. s 841(a)(1) (1988); and attempting to kill a government witness in violation of 18 U.S.C. §1512(a)(1)(A) (1988). The District Court departed upward from the 108-month maximum guideline sentence, and imposed a sentence of 180 months. Drew appealed his conviction and sentence and this Court affirmed. See *United States v. Drew*, 894 F.2d 965 (8th Cir.) (Drew I), *cert. denied*, 494 U.S. 1089, 110 S.Ct. 1830, 108 L.Ed.2d 959 (1990).

In 1992, Drew filed a motion under 28 U.S.C. §2255, asserting the following claims: (I) the District Court erred in departing upward from the sentencing guidelines; (II) the extent of the District Court's upward departure was unreasonable as a matter of law; (III) he received ineffective assistance of counsel at trial; (IV) he received ineffective assistance of counsel at sentencing; (V) he received ineffective assistance of counsel on appeal; (VI) his sentence was based on a greater quantity of drugs than he was shown at trial to have possessed; (VII) the government failed to disclose exculpatory evidence at trial; and (VIII) his sentence was improperly enhanced for possession of a weapon.

The District Court held that claims I, VI and VIII had been raised and decided on direct appeal and therefore were barred. Because Drew does not challenge the District Court's dismissal of those claims, they are not before us. The District Court refused to review claims II and VII, holding that both claims were barred because they could have been raised on appeal but were not. Finally, the District Court rejected claims III, IV and V as meritless.

On appeal, Drew reasserts his ineffective assistance of counsel claims (claims III, IV and V). In addition, he asserts that the District Court erred in refusing to review the reason-

ableness of the extent of its upward departure (claim II), and the government's failure to disclose exculpatory evidence (claim VII). We address each of these issues in turn.

I.

We review claims of ineffective assistance of counsel de novo, and the District Court's findings of underlying predicate facts for clear error. *Iron Wing v. United States*, 34 F.3d 662, 664 (8th Cir.1994). To prevail on his ineffective assistance of counsel claims, Drew must show both deficient performance and prejudice; that is, Drew must demonstrate (1) that his counsel's performance "fell below an objective standard of reasonableness," and (2) that it is reasonably probable that, "but for counsel's unprofessional errors, the result of the proceedings would have been different." *Wilson v. Armontrout*, 962 F.2d 817, 819 (8th Cir.) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), cert. denied, — U.S. ——, 113 S.Ct. 383, 121 L.Ed.2d 293 (1992). Having thoroughly reviewed the record, we conclude that Drew's ineffective assistance claims must fail because he has not shown that he was prejudiced by the alleged errors of his counsel.

A.

Drew asserts first that his trial counsel was ineffective because she advised him not to testify at trial. Drew claims that had he not been dissuaded by counsel he would have testified that it was not his idea to kill the government's witness but rather that the idea was suggested to him by the government's cooperating witness, Frank Biondo. In addition, Drew claims that he would have denied that he had any connection to the drug house from which he allegedly sold drugs. It comes as no surprise to discover that, had he testified, Drew would have denied the allegations lodged against

him. Drew's counsel found this testimony to be less than compelling, and advised Drew to remain silent. Even if the advice of Drew's counsel could be viewed as somehow unreasonable, the omission of Drew's proposed testimony nevertheless falls well short of undermining our confidence in the outcome of the trial. See *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir.1993). Accordingly, we reject Drew's ineffective assistance of trial counsel claim.

B.

Drew claims also that he received ineffective assistance of counsel at sentencing because his counsel failed to object to the extent of the District Court's upward departure. Additionally, Drew argues that his sentencing counsel was ineffective because she failed to present witnesses who would have testified to Drew's good character in mitigation of his sentence.

With respect to the upward departure, the gravamen of Drew's prejudice argument is that, had his counsel objected to the extent of the upward departure at sentencing, the issue, thus properly preserved, could have been raised on direct appeal to this Court.[3] Drew contends that it is reasonably probable that this Court would have found the extent of the District Court's upward departure to be an abuse of discretion. Because, on direct appeal, Drew's counsel challenged only the District Court's authority to depart upward and did not question the extent of the departure, we did not specifically address the latter issue in Drew I. Accordingly, in order to determine whether Drew was prejudiced by his counsel's

[3]Drew also claims that counsel's failure to raise the extent of the upward departure on appeal constituted ineffective assistance of counsel. See Part I.D., infra.

failure to raise this issue, we now review the extent of the upward departure for abuse of discretion. See *United States v. Sweet*, 985 F.2d 443, 445 (8th Cir.1993) (citing *United States v. Lara-Banda*, 972 F.2d 958, 959-60 (8th Cir.1992) (standard of review)).

Drew was convicted of attempting to kill a government witness, and was sentenced under U.S.S.G. s 3C1.1 (1987), a section entitled "Willfully Obstructing or Impeding Proceedings." We noted in *Drew I* that the most serious acts enumerated in the guidelines commentary to s 3C1.1 were "threatening, intimidating, or otherwise unlawfully attempting to influence a ... witness." *Drew I*, 894 F.2d at 974 (quoting U.S.S.G. s 3C1.1, comment. n. 1(d)). Given the comparatively benign nature of the conduct contemplated by the commentary, we concluded that an attempt to murder a government witness was a factor that had not been given adequate consideration by the Commission in formulating §3C1.1. *Drew I*, 894 F.2d at 974. Accordingly, we held that the District Court did not err in determining that an upward departure from the guidelines was warranted under U.S.S.G. §5K2.0. Id. at 974.

This Court has recognized that the extent of an upward departure is "quintessentially a judgment call" by the district court. *United States v. Passmore*, 984 F.2d 933, 937 (8th Cir.1993) (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), cert. denied, 493 U.S. 862, 110 S.Ct. 177, 107 L.Ed.2d 133 (1989)). Because the dynamics of a particular case "may be difficult to gauge from the 'antiseptic nature of a sterile paper record,' " our review must take into account "the trier's superior 'feel' for the case." Id. at 937-38. Accordingly, we will not lightly second-guess the extent of a district court's upward departure.

Having reviewed the record in this case, we cannot say that the District Court abused its discretion by sentencing

Drew to an additional seventy-two months of imprisonment. We note that Drew's resulting sentence of 180 months for the combined drug offenses and the attempt to kill a witness is still five years less than the statutory maximum sentence of twenty years for the attempted murder conviction alone. See 18 U.S.C. §1512(a)(2)(B) (1988). Because we hold that the District Court's upward departure was not an abuse of discretion, Drew was not prejudiced by his counsel's failure to object to the extent of the upward departure at sentencing, and counsel was not ineffective in this regard.

C.

Drew also argues that he was prejudiced by the failure of his counsel to present mitigating witnesses at sentencing who would have testified as to Drew's character. The District Court found that even "if evidence of movant's good character had been presented at sentencing, there is certainly not a reasonable probability that the outcome would have been different." *Drew v. United States*, No. 92-0569, Order at 9-10 (W.D.Mo. March 31, 1994). Inasmuch as the District Court sentenced Drew, its view of this matter is entitled to great weight, and Drew has offered us no reason to believe its conclusion regarding the potential effect of mitigating testimony is erroneous. Because Drew has failed to show that he was prejudiced by the allegedly deficient performance of his sentencing counsel, this ineffective assistance claim must fail.

D.

We turn next to Drew's ineffective assistance of appellate counsel claim. Drew argues that his counsel was ineffective because she failed to challenge the extent of the District Court's upward departure on direct appeal. Here again, Drew must demonstrate both deficient performance and prejudice. *Wilson*, 962 F.2d at 819. Because we already have determined

that the extent of the District Court's upward departure was reasonable, Drew cannot show that he was prejudiced by his counsel's failure to raise the issue on direct appeal. Thus, Drew's ineffective assistance of appellate counsel claim, like all of his other ineffective assistance claims, is lacking in merit.

II.

Drew next claims that the District Court erred in failing to review his claim that the extent of the Court's upward departure was unreasonable as a matter of law. We need not tarry on this point, as we already have determined in resolving Drew's ineffective-assistance-of-counsel claims that the extent of the upward departure was reasonable, and this forecloses the issue.

III.

In claim VII of his § 2255 motion, Drew argued that the government suppressed exculpatory evidence prior to trial. The evidence to which Drew referred consists of medical records which reflect that government witness Carolyn Tanner once had been hospitalized for drug addiction and depression, had threatened suicide, and had been diagnosed as having a personality disorder. Drew argues that his counsel's cross-examination of Tanner would have been more effective if Tanner's medical records had been disclosed. The District Court held that this claim was barred because it could have been raised on direct appeal but was not. Drew now argues that the District Court's holding was erroneous.

Drew's brief offers us scant reason to upset the District Court's determination of procedural bar, and the record on this point is not well developed. The government's brief, regrettably, only muddies the question. We do know, however, that at trial Drew's counsel cross-examined Tanner about

her treatment for drug addiction and depression and also about her suicide threats. It therefore is difficult to believe the defense was unaware there were medical records to be had and hence was unable either to obtain the documents or to make a record on this issue and then bring it up on direct appeal. We thus are strongly inclined to think that the District Court probably was correct in holding this claim to be procedurally barred. Nevertheless, because the record does not permit us to decide this issue with apodictic certainty, we proceed directly to the merits of Drew's suppression claim, which are easily resolved.

The alleged suppression of Tanner's medical records is a violation of Drew's due process rights only if those records are "material." *Reese v. Frey*, 801 F.2d 348, 350 (8th Cir.1986) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963)). To demonstrate materiality in a *Brady* case, the accused must show there is a reasonable probability that if the allegedly suppressed evidence had been disclosed at trial the result of the proceeding would have been different. *United States v. Ryan*, 9 F.3d 660, 664 (8th Cir.1993). A "reasonable probability" is a probability sufficient to undermine the reviewing court's confidence in the outcome of the proceeding. Id.

Our confidence in the outcome of Drew's trial is not at all undermined by the omission of the medical records at issue here. The record reflects that even without Tanner's medical records, Drew's counsel effectively cross- examined Tanner with respect to her treatment for drug addiction and depression, and her threats to commit suicide. We have held that "the availability of other opportunities to elicit the same information on cross- examination is significant in determining whether a defendant's constitutional rights have been violated." *United States v. Klauer*, 856 F.2d 1147, 1149 (8th Cir.1988) (discussing the confrontation clause). The only novel fact re-

vealed by Tanner's medical records is that she had been diagnosed as having a "personality disorder." Whether such a diagnosis has any bearing on Tanner's credibility as a witness is not immediately apparent. Nor are we assisted by Drew's brief, which is silent on the matter.

In short, we believe that the trial testimony was sufficient to apprise the jury of Tanner's depression, suicide threats, and drug addiction, and thus to permit the jury to make an informed judgment as to Tanner's credibility. As our confidence in the outcome of the trial is not undermined by the absence of Tanner's medical records, we conclude that Drew's claim VII affords him no basis for relief.

IV.

For the foregoing reasons, we affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2348WMKC	*	
Dennis Edward Drew,	*	
Appellant,	*	Appeal from the United States District Court for the Western District of Missouri
vs.	*	
United States of America,	*	
Appellee.		

The petition for rehearing filed by the appellant has been considered by the court and is denied.

March 6, 1995

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

18 U.S.C. §3742(f)
Review of a sentence

(f) Decision and disposition. -- If the court of appeals determines that the sentence --

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and --

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

18 U.S.C. §3553(a)
Imposition of a sentence

(a) Factors to be considered in imposing a sentence. -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

28 U.S.C. §991(b)
United States Sentencing Commission

(b) The purposes of the United States Sentencing Commission are to --

(1) establish sentencing policies and practices for the Federal criminal justice system that --

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. §994(f)
Duties of the Commission

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

28 U.S.C. §2241(a)
Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. §2255
Federal Custody: Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Sentencing Guidelines §2A2.1 (1987)
Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder

(a) Base Offense Level: 20

(b) Specific Offense Characteristics

(1) If an assault involved more than minimal planning, increase by 2 levels.

(2) (A) If a firearm was discharged, increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished or its use was threatened, increase by 3 levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury add	2
(B) Serious Bodily Injury add	4
(C) Permanent or Life-Threatening Injury add	6

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

(4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

Sentencing Guidelines §2J1.2 (1987)
Obstruction of Justice

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the defendant obstructed or attempted to obstruct the administration of justice by causing or threatening to cause physical injury to a person, or property, increase by 8 levels.

(2) If the offense defendant substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross reference

(1) If the conduct was obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such criminal offense; if the resulting offense level is greater than that determined above.

Sentencing Guidelines §3D1.2 (1987)
Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§3D1.2-3D1.5. Counts involve substantially

the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. §994(1)(2).

(2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. §3584(a).

(3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. §994(u).

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When counts involve the same general type of offense and the guidelines for that type of offense determine the offense level primarily on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm. Offenses of this kind are found in Chapter Two, Part B (except §§2B2.1-2B3.3), Part D (except §§2D1.6-2D3.4), Part E (except §§2E1.1-2E2.1), Part F, Part G (§§2G2.2-2G3.1), Part K (§2K2.3), Part N (§§2N2.1,

2N3.1), Part Q (§§2Q2.1, 2Q2.2), Part R, Part S, and Part T. This rule also applies where the guidelines deal with offenses that are continuing, e.g., §§2L1.3 and 2Q.13(b)(1)(A).

Sentencing Guidelines §3D1.4
Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 1/2	add 1 level
2	add 2 levels
3	add 3 levels
4 or 5	add 4 levels
More than 5	add 5 levels

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

(d) Except when the total number of Units is 1 1/2, round up to the next largest whole number.